No. 47688-6-II
Clark County Superior Court No. 14-1-01698-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,
Plaintiff-Appellee,
v.

DAVID NOVICK,
Defendant-Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR CLARK COUNTY

The Honorable Robert Lewis, Judge

APPELLANT'S REPLY BRIEF

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I.
ARGUMENT

A. THE EVIDENCE WAS INSUFFICIENT BECAUSE THERE WAS NO PROOF THAT NOVICK INTENTIONALLY RECORDED PRIVATE CONVERSATIONS

The State maintains that Novick is merely asking this Court to accept his testimony over that presented by the prosecution. But Novick's claim turns on undisputed testimony that the State could not find any trace of Novick placing a command to record audio. Without such evidence, there was no proof that Novick *intentionally* recorded conversations. *See* Opening Brief at 6-12. The State never acknowledges that point.

B. IN THE ALTERNATIVE, NOVICK SHOULD HAVE BEEN CHARGED WITH ONLY ONE COUNT EACH OF COMPUTER TRESPASS AND INTERCEPTING CONVERSATIONS BECAUSE THE CORRECT UNIT OF PROSECUTION COVERS THE ENTIRE COURSE OF CONDUCT

The State opines that Novick's position is "nonsensical" but does not support that claim with case law or the rules of statutory construction. Rather, the State suggests that Novick's position must be wrong because "it's feasible a person could illegally access the same person's computer over and over and over again, even after being arrested, tried and convicted for computer trespass, without committing a second offense." Brief of Respondent (BOR) at 11-12. But, as the State notes, such anomalies were addressed in *State v. Hall*, 168 Wn.2d 726, 230 P.3d 1048

(2010), the very case that Novick primarily relies on. In *Hall*, the Court held that the defendant committed a single act of witness tampering, despite contacting the witness over 1,000 times for that purpose. The *Hall* Court noted, however, that the result might be different if Hall "had been stopped by the State briefly and found a way to resume his witness tampering campaign." *Hall*, 168 Wn.2d at 737. Likewise, the Court noted that additional units of prosecution

> may be implicated if additional attempts to induce are interrupted by a substantial period of time, employ new and different methods of communications, involve intermediaries, or other facts that may demonstrate a different course of conduct.

Id. at 737-38. The *Hall* Court found it unnecessary to decide such issues, however, because they were not present in Hall's case. Likewise, no such issues apply here. By all accounts, there was no change in Novick's course of conduct during the charging periods.

The State now claims, with no citation to the record, that Novick "stopped after his initial conduct" and then continued on. But the trial testimony showed that he was accessing Maunu's phone constantly. *See* Opening Brief at 17.

The State also argues that this Court should analogize to the unit of prosecution for criminal trespass. But the State merely assumes that the unit of prosecution for that crime is one charge for every trespass. It cites

no authority for that proposition, and undersigned counsel could find none. The answer might depend on the circumstances. For example, suppose the defendant crossed back and forth across a neighbor's yard over a period of hours or days while moving all of his belongings into a large van. The courts would probably find that this amounted to a single trespass, particularly if the neighbor did not confront the defendant before the moving ended.

In any event, as Novick has pointed out in his opening brief, computer trespasses are different from physical ones because they generally involve thousands or millions of accesses. The legislature could not have intended that the run-of-the-mill computer trespass would result in a charge for every access. Once again, the Supreme Court's reasoning in *Hall* applies here:

> The Court of Appeals also reasoned that unless each new conversation is separately chargeable, the defendant will have no incentive to stop attempting to tamper with a witness. But if we adopt that reasoning, the corollary is that each conversation is a separate crime and, in this case for example, could lead to as many as 1,200 separate crimes. Such an interpretation could lead to absurd results, which we are bound to avoid when we can do so without doing violence to the words of the statute.

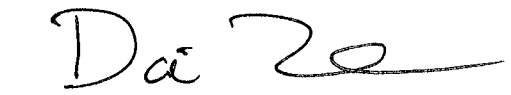
Hall, 168 Wn.2d at 736-37. It follows with greater force that the legislature could not have intended the even more absurd result for the much greater numbers of violations at issue here.[1]

II.
CONCLUSION

This Court should find the evidence insufficient and overturn all the convictions. In the alternative, it should find that only two crimes were committed in view of the proper unit of prosecution.

DATED this 22nd day of February, 2016.

Respectfully submitted,



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[1] There were over 8,000 records involving the Mobile Spy websites, including at least 500 audio recordings. 2A RP 385.

CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by email where applicable and by First Class United States Mail, postage prepaid, one copy of this brief on the following:

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02/22/2016
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February 22, 2016 - 11:52 AM

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Court of Appeals Case Number: 47688-6

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